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In the Supreme Court of the United States

OCTOBER TERM, 1935.

NO. 335

GEORGE NOBLE and WILLIAM NOBLE,
Petitioners,

VERSUS

THE CITY OF OKLAHOMA CITY,
a Municipal Corporation,

NO. 336

ROBERT W. HIGGINS, JR., JOHN T. HIGGINS,
RALEIGH E. HIGGINS ET AL.,
Petitioners,

VERSUS

THE CITY OF OKLAHOMA CITY,
a Municipal Corporation,

REPLY BRIEF OF PETITIONERS

JOE T. ROGERS,
HENRY L. GODDARD,
WARREN E. LIBBY,
R. L. DISNEY,
FRED E. SUITS,
FRED PTAK,
CHAS. H. GARNETT,
Counsel for Petitioners.

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The Cases Are Not Decided on a State Question

Because of the unforeseen contention raised by respondent that the decision of the Oklahoma Supreme Court in the *Higgins* case could and should have been based on a question of state law only and therefore certiorari ought not to be granted in that case, the petitioners deem it desirable to file a reply brief.

Petitioners do not dispute the statement of the law on this point by respondent. They agree that where a state court decides a case upon a non-federal question which is decisive of the whole case, then its decision on a federal

question in the same case will not be reviewed by this Court, regardless of whether such decision is right or wrong. When the non-federal question decided in the case is broad enough to sustain the court's decision, then this Court will not be concerned as to how any federal question involved may have been decided.

Respondent contends that the so-called right of way deed in the *Higgins* case (R. 152 fl.) conveyed a title in fee simple absolute to the described land to the Choctaw, Oklahoma & Gulf Ry. Co., grantee therein, which title was conveyed by the railway companies' deed to the respondent (R. 177), and that the Oklahoma Court would have so held, if it had passed on the character of title conveyed by that instrument, and that it would have passed on that point, if it had not decided the case adversely to the petitioners on other grounds.

An examination of the pleadings in the case shows that the respondent specifically denied the execution of the right of way deed from Higgins to the railroad company and specifically denied that Higgins had any title to convey by that deed. The answer says:

> "4. Defendant has no knowledge as to whether or not the said Robert W. Higgins, Sr., by the name and style of Robert W. Higgins and Susan A. Higgins, his wife, made, executed and delivered to the Choctaw Coal and Railway Company the alleged right of way deed and release of damages described in paragraph four of plaintiff's petition, a copy of which is set forth as Exhibit 'B' thereto, and defendant therefore specifically denies that such a deed was executed and delivered, and defendant further specifically denies that

the said Robert W. Higgins, Sr., at the time of the execution and delivery of said alleged deed was the owner of the fee simple title to the land described and set forth in said alleged right of way deed and release of damages. But defendant avers that if such a deed was executed and delivered, which is not admitted but is hereby expressly denied, neither the plaintiff nor his wife, Susan A. Higgins, by reason of the facts aforesaid, had any right, title, interest or estate, to or in said land at the time of the execution and delivery of said alleged quit claim deed and release of damages and that plaintiff now has no right, title or interest in or to said land or any valid claim thereto" (R. 156).

Respondent now says that the state courts should have held that Higgins by that deed conveyed a title in fee simple absolute.

Again, the answer says:

"6. Defendant admits that when the railroad companies discontinued the use and occupation of said land as and for a right of way and for railroad purposes, their title thereto was defeated and terminated, upon a decree being entered in the United States District Court in and for the Western District of the State of Oklahoma, finding, holding and declaring that such railroad companies had so abandoned said property" (R. 160).

Respondent now says that the state courts should have held that by the Higgins deed the railroad company took a title in fee simple absolute which was conveyed by its deed (R. 177) to respondent. Plainly, if it took such title by the Higgins deed, then under the decisions in the other Oklahoma cases on which respondent relies, its title could not

have been, and so was not, "defeated and terminated" by abandonment of the land and the decree of the United States District Court (R. 37-40).

In its judgment the trial court makes a general finding of the issues for the defendant (respondent) and then the following holding upon the law:

> "The Court holds, as a matter of law, that the Act of Congress of February 18, 1888 (25 Stats. 35) together with the Acts amendatory thereof, was a present absolute grant of the land described in the petition herein for right of way and station grounds to the Choctaw Coal and Railway Company, vesting the fee title to said land in said Company immediately upon the enactment and approval of said Act, with a possibility of reverter in the United States, and that the patent purporting to convey to R. W. Higgins the whole of the Southwest Quarter of Section Thirty-three (33), in Township Twelve (12) North, Range Three (3) West of the Indian Meridian, was ineffective to convey to said R. W. Higgins any title to the land within the boundaries of the right of way of said Company across said quarter section as and when located and that, therefore, the said right of way having been located in conformity to said Act, so as to include all the land involved in this action, neither the plaintiffs, nor any persons through whom they claim to have derived title under said patent, now have, or have ever had, any sort of right or title whatsoever to said land.
>
> "The Court holds further, as a matter of law, that the land included within the boundary lines of said right of way, as the same should thereafter be and was thereafter located, was, by the Act of Congress aforesaid, appropriated to a lawful use and thereby severed from the public domain of the United States, and was never thereafter subject to preemption, home-

stead or townsite entry, and that the Land Department of the United States had no authority, after the enactment of said Act, to grant any title to said land to any person.

"The Court further holds, as a matter of law, that upon abandonment for railway purposes of said land within the boundaries of said right of way and station grounds, title to said land revested in the United States, and upon entry of the decree of the United States District Court for the Western District of Oklahoma finding such abandonment, that the title to said land immediately vested in the City of Oklahoma City, a municipal corporation, by virtue of the Act of Congress of March 8, 1922 (42 Stats. 414)" (R. 187 fl.)

The judgment follows the finding and the holding on the law. It is plain that the judgment of the trial court is not based on any question of state law, but is based exclusively and solely on federal questions.

An examination of the decision of the State Court in these cases shows that it is not based on any state or non-federal question, but is based squarely and solely on the interpretation and application of various Acts of Congress.

This appears from the following excerpts from the decision in which the questions presented and the holding thereon are stated:

"At the very threshold we are confronted with the nature of the right, privilege, or estate granted by the above-quoted act to the Choctaw Coal & Railway Company, it being contended by defendant that a right of way in the nature of a base or determinable fee, with possibility of reverter in case of nonuser, was granted by said act. But plaintiffs contend that only a fran-

chise was granted to said railway company to acquire a right of way over said lands, and that Congress was without authority to grant more than a mere right to exercise the sovereign power of eminent domain for the reason that at the time of the passage of said act said lands belonged to the Creek Tribe of Indians, or at least that the Creek Tribe of Indians had an interest therein, which Congress was without authority to impair (R. 202).

* * * * * * * *

"With all of the congressional recognition of the rights of the railroad company, both prior and subsequent to the attachment of any rights of plaintiffs, it is clear that plaintiffs, after the lapse of 40 years, cannot claim a want of title in the United States to defeat whatever rights were granted, recognized, and acquiesced in by the Congress, the public, and the predecessors in title of the plaintiffs (204).

* * * * * * * *

"It is conceded that upon abandonment by the railroad company its title terminated. We must determine, however, whether or not the reverter inured to the United States or passed by the government patent issued to plaintiff's predecessors (R. 210).

* * * * * * * *

"It is contended by plaintiffs, however, that the railroad company abandoned a portion of its right of way as granted by Congress under the Act of 1888, and substituted in lieu thereof a purchased right of way over lands of plaintiffs' predecessors, and that having accepted right of way deeds from plaintiffs' predecessors, the railroad company and its successors in title, the city, are estopped from asserting an adverse title to the title of plaintiffs" (R. 216).

* * * * * * * *

"Plaintiffs contend, however, that by the acceptance of the deeds hereinabove mentioned, the railroad company, and its successors in interest, the city are estopped from denying the title of plaintiff's predecessors to the tracts of land in controversy. This claim of plaintiffs overlooks, however, that the title of the railroad company was extinguished by abandonment and that the right of reverter inured to the benefit of the United States and that by Act of Congress dated March 8, 1922 (42 Stats. 414), the United States invested in the city the title to said property by specific grant for certain purposes as set forth in said act. There can be no estoppel as against the United States arising by reason of the individual acts or contracts of individuals. The title of the city is deraigned from the government and not from the railroad company, nor from the predecessors of plaintiffs.

"The reversion clause in the Noble deed purported to contract with reference to a right retained by the United States government, and was therefore wholly ineffective. We point out also that in the Higgins deed the deed expressly recognized the rights of the company under the Act of 1888, and subsequent acts, which right we have determined hereinabove to be superior to the claims of the Higgins heirs. We conclude that upon abandonment by the railroad company, and the judicial determination thereof, as hereinabove set forth, the city became invested with the title to the tracts of land in controversy subject to the provisions of Congress by the Act of March 8, 1922 (42 Stats. 414)" (R. 221).

It is plain the Oklahoma Supreme Court did not recognize any question of state law involved in the cases. It did not consider or decide any such question, but based its decision squarely and solely on federal questions. If it could

be said that a construction of the Higgins right of way deed necessarily inheres in a decision of the case, then the decision of the Court on that question is adverse to respondent and could not possibly be considered a ground of decision in respondent's favor. So respondent must fall back on the claim that the Court would have decided that question differently if it had not decided in respondent's favor on the federal questions.

Surely respondent may not thus speculate on what the court might or would have done, but did not. And in any event the fact is that the court did, without discussion but in clear and definite language, hold that the railroad company acquired no title under the Higgins deed which it could transmit by deed upon abandonment of the land for railroad purposes. The court says (R. 210), as quoted above, that "upon abandonment by the railroad company its title terminated" and the resulting question was as to whom the reverter inured, and again (R. 221) that "the title of the railroad company was extinguished by abandonment", and again that (R. 221) "the title of the City is deraigned from the Government and not from the railroad company, nor from the predecessors of plaintiffs."

Respondent says that this Court ought to examine the decisions of the Oklahoma Court in the cases of *Marland* v. *Gillespie*, 168 Okla. 376, 33 Pac. (2d) 207, and *Oklahoma City* v. *Dobbins*, — Okla —, 44 Pac. (2d) 148, and from such examination reach the conclusion that it ought to have held in these cases that the right of way deed from the Higgins' ancestor conveyed a fee title to the railroad

company. Now if this Court should examine the *Marland* case, it will find that the instrument there under consideration was a complete statutory warranty deed, but containing a recital that the land conveyed was for right of way for a railroad track. The questions decided were whether a railroad company had capacity to take a fee title to a right of way under the laws of Oklahoma, and whether that deed conveyed a fee title. Both questions were answered in the affirmative, with Justice McNeill rendering a long and vigorous dissenting opinion. In previous decisions the Court had held that a railroad company had no capacity to take, and could not by any sort of conveyance take, any title to a right of way other than a right to the surface for railroad purposes with an implied reverter to the grantor or those claiming under him in event the land was abandoned for such purposes. These cases were expressly overruled in the *Marland* case. Then it was further held that the mere recital in the warranty deed of the purpose for which the land was to be used was not a limitation or restriction on the quality of title conveyed.

In the *Dobbins* case the instrument under consideration was the plainest, simplest form of warranty deed. There is nothing in it to suggest a railroad use except such inference as might be drawn from the name of the grantee. There the Court followed the *Marland* case without discussion and again held that under Oklahoma law a railroad corporation has the capacity to take a fee title to land for railroad purposes. In respect of the effect of the deed, the Court said:

> "The controversial issue as to the rules of law relating to a fee simple and a right of way are not presented by the record in this case, for the deed on its face purports to grant a fee-simple title, with no words of limitation. The conveyance was voluntary. The only question involved herein is whether or not there was authority in the company to acquire such title."

Thus it appears that there is nothing in either of those cases to indicate that the Oklahoma Court, if it had considered that there was a controversial issue as to the character of title which the Higgins deed conveyed and had decided such issue, would have reached the conclusion that it conveyed a fee simple title. On the contrary, as shown in the matter quoted above, the Court repeatedly and emphatically stated that the railroad title was extinguished by abandonment and that the respondent deraigned its title from the United States, and not from the railroad company, nor from petitioners predecessor in title.

The Court apparently assumed it was so obvious the Higgins deed conveyed nothing but an easement for railroad purposes that no one would have the hardihood to contend to the contrary, and that it was sufficient without elaborate discussion of the subject simply to state that whatever title the railroad company got by that deed terminated when the land was abandoned for railroad use. This holding stands out the more clearly in contrast with its contemporaneous holding in the *Marland* and the *Dobbins* cases.

Reply to Some Statements in Respondent's Brief

The foregoing covers the chief reason for this reply brief. But since they are filing a reply brief, petitioners desire to refer to a few statements in respondent's brief which should not pass unchallenged. The pages given below are where the matter referred to appears in respondent's brief.

At page 4:

Respondent quotes a part of the first sentence of Article 20 of the Treaty with the Creeks and Seminoles of August 7, 1856, 11 Stat. 699. This sentence in full is as follows:

> "Article 20. The United States, or any incorporated company, shall have the right of way for railroads, or lines of telegraphs, through the Creek and Seminole countries; but in the case of any incorporated company, it shall have such right of way only upon such terms, and payment of such amount to the Creeks and Seminoles, as the case may be, as may be agreed upon between it and the national council thereof; or, in case of disagreement by making full compensation, not only to individual parties injured, but also to the tribe for the right of way, all damage and injury done to be ascertained and determined in such manner as the President of the United States shall direct."

It is plain that the United States was not exercising the right given it by that Treaty to build a railroad through the Creek country when the Choctaw Railway Act was enacted. The Treaty provides that an incorporated company may have the right of way for a railroad upon

payment of an agreed price therefor, or in case of disagreement by a method of determination which would amount to condemnation proceedings. No authority is there given for the United States to grant a railroad company a right of way *in praesenti* through the Creek Country. On the contrary the only thing the United States is authorized to do is exactly what it did in the Choctaw Railway Act, which was to grant the railroad company a franchise to construct a railroad through the Indian country and to exercise the power of eminent domain to obtain title to a right of way, with an express reverter of the land taken whenever it was abandoned for railroad use.

At page 6:

Respondent charges that petitioners are in error in stating that it was conceded in the courts below that upon the abandonment of the land by the railroad company, it reverted either to the United States or to petitioners through their predecessors in title. In answer to this, petitioners refer to the language of the Oklahoma Supreme Court on this point quoted above. The Court there says that this precise thing is conceded.

At page 21:

Respondent cites *Mackey* v. *Choctaw, O, & G. R. Co.*, 261 Fed. 342, and says that the Court there spoke of the Choctaw Railway right of way as one "granted by Congress *in praesenti*". This is not a true quotation. The Court does not use any such language nor its equivalent. The expression "*in praesenti*" can not be found in the de-

cision or in the syllabus. The Court speaks of "the Congressional grant of the easement for railroad purposes", and of the "purposes for which Congress granted the railroad easement", and says that "the easement of the Choctaw, Oklahoma & Gulf Railroad Company * * * was granted in perpetuity."

Thus the right of way itself was regarded only as an easement. The question of the manner in which the railroad company acquired title, whether by purchase, grant or condemnation, was not before the Court and was not considered or decided. The only thing the Court was concerned with was the character of title which the railroad company held. The most casual reading of the opinion shows that all the Court meant in the expressions used was that the railroad company had acquired a title, either easement or limited fee, to its right of way under grant of authority from Congress. So far as any issue in the case was concerned, it was wholly immaterial whether that had been the grant of a title vesting *in praesenti* or the grant of a franchise to construct a railroad and of the power of eminent domain to condemn and acquire a right of way therefor.

At page 22:

Respondent cites the decision of the Supreme Court of the United States in the above case, *Choctaw, O. & G. R. Co.* v. *Mackey*, 256 U. S. 531, and quotes what is said to be the beginning of the second syllabus. We do not know who writes the syllabi for the decisions of the Supreme Court of the United States. We do know that the matter quoted

by respondent is not in the syllabus to the report of the case to which we have access. Nor is such language, or any similar language, to be found in the opinion of the Court itself. There, as in the Appeals Court, the question considered was the character of the railroad company's title and not the manner in which it was acquired.

The only reference to the manner of acquisition is where the Court says that the Choctaw, Oklahoma & Gulf:

> "Had, in locating its railroad through Holdenville, taken, besides the right of way 100 feet wide, an additional strip for station purposes 200 feet wide, with a length of 3,000 feet, having acquired the power so to do by succeeding to the powers and franchises of the Choctaw Coal & Railway Company. To that Company Congress had in 1888 granted the right to build a railroad in Indian Territory, with a branch line to coal mines leased from the Choctaw Nation."

There is no suggestion here that Congress had granted *in praesenti* a right of way and station grounds to the railroad company.

At page 30:

Respondent criticizes petitioners for saying it was conceded in the lower courts that unless the railway company's title to the involved right of way vested instantly under the Act of Congress, then such title was inferior to that of the petitioners' predecessors in title.

The decision of the Oklahoma Supreme Court seems sufficient authority for this statement. Besides its truth is so obvious that concession of it could properly be assumed.

If the Choctaw Railway Act did not grant a right of way *in praesenti*, then the railway company never did acquire title under that act, or if it did, then no title was acquired until the filing of its map of location on July 16, 1889. Long before that date the rights of petitioners' ancestors had attached to the land here involved.

The respondent emphasizes (Br., pp. 29, 51) the fact that the railroad company had surveyed a line of road and staked a right of way across the Oklahoma City townsite before it was opened to settlement. The law is well settled that surveying and staking a right of way of itself confers no sort of title or priority of right. If a railroad company had a right of way granted *in praesenti*, then no survey and staking was necessary to establish its title. If it did not have a grant of title *in praesenti*, then its right could be established either *(1)* by filing its map of definite location in the office of the Secretary of the Interior, or *(2)* by actual construction of its road, and in no other way. Surveying and staking a line for a road is not *actual construction* of the road. The following cases so hold:

Sioux City & I. F. Town Lot & Land Co. v. *Griffey*, 143 U. S. 32;

Jamestown N. R. Co. v. *Jones*, 177 U. S. 25;

Minneapolis, St. Paul & St. Me. R. Co. v. *Doughty*, 208 U. S. 251.

At page 32:

Respondent says that petitioners cite without comment the case of *Northern Pacific Railway Co.* v. *Townsend*, 190

U. S. 267, in support of their case. This statement is in error, for petitioners' reference to this case is merely that it was considered in *Crandall* v. *Goss,* 130 Ida. 1061, 167 Pac. 1025, in which the Idaho Court held that there was nothing in the *Townsend* case to require the reverter of the railroad right of way upon its abandonment for railroad purposes to the United States, instead of the owner of the servient fee, and that in such situation, notwithstanding the *Townsend* case, the title to the abandoned right of way would vest in the owner of the servient fee.

As pointed out in our original brief, the *Townsend* case did not deal with a situation where a railroad right of way was wholly abandoned for railroad purposes and the question of whom the land reverted to was presented for decision.

At page 38:

Respondent says the case of *Denver & R. G. Co.* v. *Stringham,* 239 U. S. 44, cited by petitioners, has no application to the instant cases. That case holds that the railroad title there involved was to the surface only for railroad purposes and that a mining claimant took the fee title to his mining claim underlying the railroad right of way and subject to the railroad use of the surface.

At page 40:

Respondent says in the case of *Denver & R. G. Co.* v. *Mills,* 222 Fed. 481, cited by petitioners, is not in point because decided on questions of Colorado law, and because the Government was not a party to it. The precise question

decided there was whether the title to the abandoned right of way reverted to the patentee where there was a grant *in praesenti* of the right of way across the land. The Court held that it did. Obviously, no Colorado law could control or affect the decision of this question.

At page 51:

Respondent says that, as to the land involved in the *Noble* case, the original survey of the line of road across the Oklahoma City townsite was never changed. A reference to the plat, Exhibit 13 (R. 90-B), shows that this survey was materially changed in respect of this land. The railroad company abandoned its claim of a right of way 100 feet wide with 200 feet additional for station grounds, and took a right of way 100 feet wide on a distinctly different line and location. Petitioners deem it immaterial whether the Noble land or any other land was or was not included in the original survey across the townsite. The change is material only on the question of the abandonment by the railroad of its originally located right of way. If the Choctaw Railway Act was a grant *in praesenti,* then title to the right of way vested in the railway company without any survey. If it was not a grant *in praesenti,* then probably no title ever vested in the railroad company under that Act, and if it did, then not until long after the ancestors of petitioners had occupied the land involved.

If the railroad company could not abandon its vested right of way, then the question of an abandonment between 1889 and 1901 disappears from these cases. If it could abandon its originally located line, the facts of the case,

including the fact of the change of the original survey, show that it did so. If it did not take a vested title *in praesenti*, then it can not be seriously disputed that it could abandon any surveyed or claimed right of way and acquire another one by purchase. Whether it could abandon a right of way granted *in praesenti* is a disputed question of law in the case.

CONCLUSION

In respect of the cases cited by petitioners in their "Reasons Relied on for the Allowance of the Writs" (Petition, pp. 14-17), as to the holding and application of which petitioners and respondent disagree, petitioners respectfully request that this Court re-examine these, if not already entirely familiar with them.

For the reasons and the grounds set forth in their original brief, petitioners assert that the instant cases are proper ones for the granting of certiorari to the State Court.

Respectfully submitted,

JOE T. ROGERS,
HENRY L. GODDARD,
WARREN E. LIBBY,
R. L. DISNEY,
FRED E. SUITS,
FRED PTAK,
CHAS. H. GARNETT,

Counsel for Petitioners.